Supreme Court U.S.
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No. 02-0191

In The
Supreme Court of the United States

KEITH YOHN,

Petitioner,

v.

STATE OFFICERS OF MICHIGAN DAVID A. BRANDON, Regent; LAURENCE B. DEITCH, Regent; DANIEL D. HORNING, Regent; OLIVIA P. MAYNARD, Regent; REBECCA McGOWAN, Regent; ANDREA FISCHER NEWMAN, Regent; S. MARTIN TAYLOR, Regent; KATHERINE E. WHITE, Regent; and their managerial agents WILLIAM E. KOTOWICZ, Dean; ROBERT J. FEIGAL, Interim Assoc. Dean; CHRISTIAN S. STOHLER, Dept. Chairman; BRIAN H. CLARKSON, Dept. Chairman; MERLE A. JAARDA and KENNETH W. STOFFERS, Co-Course Directors; in their individual capacities at State University in Ann Arbor,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether only those issues appealed to the Sixth Circuit have been properly preserved for consideration by the Court.

II. Whether Petitioner has a constitutionally protected interest in the grade received by a student; whether *Parate v. Isibor* is dispositive of this case.

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CITATIONS OF OPINIONS AND ORDERS ENTERED

In the United States Court of Appeals for the Sixth Circuit:

Keith Yohn v. University of Michigan Regents, et. al., 2002 WL 1378212, No. 01-1734, (6th Cir. June 24, 2002) (unpublished disposition)

In the United States District Court for the Eastern District of Michigan:

Keith Yohn v. Board of Regents of the University of Michigan, et. al., Case No. 99-75997

Judgment, entered May 7, 2001 (unpublished)

Order Accepting in Part, and Rejecting in Part the Magistrate's Report and Recommendation, May 7, 2001 (unpublished)

Report and Recommendation, December 28, 2000 (unpublished)

STATEMENT OF THE BASIS FOR JURISDICTION

Petitioner filed a complaint in the United States District Court for the Eastern District of Michigan on or about December 15, 1999, alleging a violation of his alleged Fourteenth Amendment "constitutionally protected property right" to report and have recorded a grade on a student's transcript. Subsequent amended complaints filed by Petitioner assert a "deprivation of [his] 'freedom of speech' right to report and have recorded a [grade]", along with state law emotional distress and defamation claims.

The district court granted Defendants summary judgment and/or dismissal and entered judgment in Defendants' favor on May 7, 2001.

Petitioner appealed to the Court of Appeals for the Sixth Circuit. On June 24, 2002, the Court of Appeals entered an order affirming the decision of the district court.

Jurisdiction in this Court is based upon 28 U.S.C. § 1254, which provides in relevant part

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;. . . .

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be

subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Proceedings Below

This case arises out of the School of Dentistry at the University of Michigan. Petitioner L. Keith Yohn, a School of Dentistry tenured faculty member, filed his Complaint in the U.S. District Court for the Eastern District of Michigan on December 15, 1999, naming the Board of Regents of the University of Michigan and twelve individuals[1] as

[1] University of Michigan regents David Brandon, Laurence Deitch, Daniel Horning, Olivia Maynard, Rebecca McGowan, Andrea Fischer Newman, S. Martin Taylor, and Katherine White were named as well as University of Michigan School of Dentistry Dean William Kotowicz, Associate Dean Robert Feigal, and Professors Merle Jaarda and Kenneth Stoffers. All were initially named in "their individual and official capacities, jointly and severally." (R. 1, Complaint, caption).

defendants. (R. 1 Complaint).[2] Thereafter, Petitioner filed three amended complaints, adding various defendants and modifying his claims.[3] His third and final amended complaint alleged that the University's act of not recording a grade he assigned to a student violated his first amendment right to academic free speech and that various other related events at the School of Dentistry caused him emotional distress and defamed him.

The University moved for dismissal and/or summary judgment. On December 28, 2000, the magistrate judge issued a Report and Recommendation, recommending that the University's Motion For Dismissal and/or Summary Judgment be granted, the complaint dismissed, and

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[2] Citations to the record are made by reference to the appropriate entry number from the district court docket as submitted to the Sixth Circuit, except where otherwise specified. Petitioner refused to include those portions of the district court record designated by the University in the appendix submitted to the Sixth Circuit, as he was required to do by F.R.A.P. 30 and 6th Cir. R. 30. Thus, no reference to the "joint" appendix is available to Respondents for certain of the items from the record cited herein. Therefore, in the interest of consistency, only references to the District Court record have been used.

[3] Petitioner's third amended complaint named the above twelve individuals, as well as Daniel Sharphorn, Assistant General Counsel of the University, and School of Dentistry Professors Christian S. Stohler and Brian Clarkson. Additionally, in his third amended complaint, he dismissed the Regents of the University of Michigan and all other named defendants in their official capacities. With the exception of Defendant Sharphorn, who Petitioner has not included as a party to this Petition, all of the Defendants identified are Respondents in this matter and will hereafter be referred to collectively as "the University".

judgment entered in the University's favor. (R. 84, Report and Recommendation).[4]

On May 7, 2001, the District Court entered an Order dismissing with prejudice Petitioner's federal claim, emotional distress claim, and state law defamation claim against Defendants Kotowicz and Sharphorn, and dismissing the state law defamation claim against Defendant Stoffers without prejudice. (R. 90, Order Accepting in Part and Rejecting in Part the Magistrate's Report and Recommendation). On the same date, judgment in favor of all Defendants was entered by the court. (R. 91, Judgment).

Petitioner appealed the District Court's decision to the Sixth Circuit Court of Appeals and raised only the following issues on appeal: 1) Whether the University's action in administratively changing a grade he assigned to a student violated his First Amendment right of free speech; 2) Whether the District Court erred in relying on *Parate v. Isibor*, 868 F.2d 821 (6th Cir. 1989); and 3) Whether the District Court improperly dismissed his intentional infliction of emotional distress claim.

On June 24, 2002, the Sixth Circuit affirmed the judgment of the District Court, relying on the reasons stated by the District Court in its Order.

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[4] Plaintiff filed objections to the Magistrate's Report and Recommendation on January 8, 2001 (R. 87, Objections to Magistrate Judge's Proposed Findings of Fact and Recommendation in Dispositive Pretrial Matter), and subsequently filed a Request for a De Novo Redetermination of Magistrate Judge's Proposed Findings of Fact and Recommendation in Dispositive Pretrial Matter. (R. 89).

Statement of Facts

The facts asserted by Petitioner are, in large part, merely allegations taken from one or more of the complaints he filed in the District Court. Except to the extent that those facts are stated in the Report and Recommendation of the Magistrate Judge, the University does not concede that the matters asserted as fact by Petitioner are accurate or complete. For purposes of the Court's review of the Petition in this matter, however, it is unnecessary to address the veracity of most of the factual allegations Petitioner makes.

The only facts in the record of this matter which are relevant to this Petition are: Petitioner was among a group of four faculty members in the School of Dentistry asked to grade the practical examinations of certain students. (R. 32, Second Amended Complaint, p. 4; R. 62 Third Amended Complaint, p. 7). Petitioner and the other faculty members collectively submitted their assigned grades to Associate Dean Robert Feigal. (R. 32, Second Amended Complaint, p. 5; R. 62, Third Amended Complaint, p. 9). Subsequently, an administrative decision was made not to record the grades submitted by Petitioner and the other faculty members. (R. 32, Second Amended Complaint, p. 5; R. 62, Third Amended Complaint, p. 9). Finally, at no time was Petitioner asked to change the grade he submitted with the other faculty members. (R. 54, Deposition of L. Keith Yohn, p. 41).

ARGUMENT

I. ONLY THOSE ISSUES APPEALED TO THE SIXTH CIRCUIT HAVE BEEN PROPERLY PRESERVED FOR CONSIDERATION BY THE COURT.

Petitioner asserts five issues with no less than 18 sub-issues in his Petition. There is some redundancy across these questions and many are not properly framed legal issues, but rather are more appropriately characterized as sarcastic attempts at rhetoric (e.g., issue V.D. asks "Does inflating a student's grade teach the student to accept lower standards, whine, cheat, lie and steal?" and issue IV.C. inquires "Are patients concerned about having a dentist with inflated grades working in their mouths and the mouths of their children?"). However, Petitioner raised only the following issues on appeal to the Sixth Circuit: Whether the University violated his First Amendment rights in administratively changing a grade he assigned to a student; Whether *Parate v. Isibor*, *supra*, a Sixth Circuit case, was improperly relied upon; and Whether the District Court erred in dismissing his emotional distress claim.

It is well-settled that the Supreme Court will not address on certiorari issues not raised on appeal in the court of appeals. *See, G.D. Searle & Co. v. Cohn*, 455 U.S. 404, 412 (1982) (holding that the Court would not address a violation of due process issue where the issue was not raised in the Court of Appeals); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 148 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."); *Duignan v. United States*, 274 U.S. 195, 200 (1927) ("It is only in exceptional cases coming here from the federal courts that

questions not pressed or passed upon below are reviewed.") Exceptional circumstances have been found by the Court where there is "plain error." *See, e.g., United Brotherhood of Carpenters v. United States*, 330 U.S. 395, 412 (1947); *Mahler v. Eby*, 264 U.S. 32, 45 (1924).

The only "plain error" issue alleged in the Petition is whether it was plain error for the District Court to dismiss Petitioner's First Amendment claim without considering the University's reason(s) for changing the grade Petitioner assigned. (Issue II., page i of Petition). As with the first question he presented to the Sixth Circuit – whether his First Amendment rights were violated – this issue assumes that Petitioner has a cognizable constitutional interest in this situation. As is discussed in full, *infra*, he does *not* as a matter of law have a constitutionally protected interest in the grade ultimately received by a student. Thus, the "plain error" issue asserted by Petitioner may be disposed of in the same manner as the first question he appealed to the Sixth Circuit – by considering as a threshold matter whether Petitioner even has a cognizable constitutional interest.

A review of the Petition clearly indicates that Petitioner has not pursued further appeal of the dismissal of his emotional distress claim.[5] Therefore, the only issues properly before this Court are whether Petitioner's First Amendment rights were violated by the University and whether *Parate v. Isibor* is dispositive of this case.

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[5] There is no mention of the emotional distress claim in Questions Presented. Additionally, in the Appendix to the Petition, Petitioner has only reproduced portions of the District Court's 15-page order, omitting all sections which addressed his emotional distress claim.

II. PETITIONER DOES NOT HAVE A CONSTITUTIONALLY PROTECTED INTEREST IN THE GRADE RECEIVED BY A STUDENT; *PARATE V. ISIBOR* IS DISPOSITIVE.

Of the various issues set forth in the Petition as questions presented, none is analyzed or even identified in Petitioner's three- and one-half page argument. Instead, Petitioner simply provides lengthy quotes from *Parate v. Isibor* and five other cases from various circuits, alleging without analysis that these cases indicate a conflict among the circuits regarding "how much protection a scholastic grade should receive." When read correctly, however, these cases – indeed the very quotes from them offered by Petitioner – not only belie any conflict among the circuits, but in fact, they uniformly support the position advocated by the University, the recommendations of the magistrate judge, the order of the District Court, and the Sixth Circuit's affirmance of the District Court, concluding that there is no constitutional protection afforded to a professor for the grade ultimately received by a student.

In *Parate*, the Sixth Circuit considered the case of a university professor who was ordered by the dean of the school in which he taught to change the grade the professor had assigned to one of his students. The professor did, in fact, succumb to the pressure he received from the dean and changed the grade he submitted for the student. In deciding the case, the Sixth Circuit noted the academic freedom of a professor to *assign* grades according to his own judgment, but dismissed the notion that the professor enjoys any constitutional interest in the grade a student ultimately receives. *Id.* at 828-829. Thus, the court concluded that it was only the act of *compelling* the professor to change the grade, rather than administrators changing

the grade themselves, which implicated a constitutional interest of the professor. The court stated

> [W]e conclude that the constitutional issue was mischaracterized below. The defendants' act of *ordering Parate* to change the grade, rather than the act of giving Student "Y" a different grade than Parate desired, gives rise to the constitutional violation.
>
> . . . .
>
> Parate, however, has no constitutional interest in the grades which his students ultimately receive. If the defendants had changed Student "Y's" [ ] course grade, then Parate's First Amendment rights would not be at issue. [His] First Amendment right to academic freedom was violated by the defendants because they ordered *Parate* to change Student "Y's" original grade. The actions of the defendants, who failed to administratively change Student "Y's" grade *themselves*, unconstitutionally compelled Parate's speech and precluded him from communicating his personal evaluation to Student "Y." *Id.* at 829.

Petitioner has never alleged – in his pleadings, briefs, or otherwise – that anyone, among the current Defendants or otherwise, acting on behalf of the University of Michigan ever suggested, requested, insisted or compelled him to change his evaluation of the students' work or the grades he submitted. Rather, Petitioner rests his entire claim on the legally unsupported allegation that he enjoys a constitutional interest in the grade a student ultimately receives. As such, this case presents exactly the circumstance that *Parate* held does *not* implicate a constitutional interest of the professor.

In an effort to diminish the authoritative effect of *Parate*, Petitioner cites cases from other circuits, which he alleges establish a conflict among the circuits on this issue. While offering some factual variations, these cases uniformly reaffirm the rule that a professor has no constitutional interest in the grade received by a student. Indeed, to the extent that any of these cases deviate from *Parate*, it is only in that they refuse to go as far as *Parate*, even declining to recognize a constitutional right of a professor to *assign* grades as he sees fit.

For example, in *Lovelace v. Southeastern Massachusetts University, et al.*, 793 F.2d 419 (1st Cir. 1986), an untenured teacher alleged that his contract was not renewed because his grading policy deviated from the standards of the university. In affirming summary judgment for the defendants, the First Circuit stated

> Plaintiff also contends that the Federation Agreement guaranteed him academic freedom and this guaranty was violated by the university's alleged action in attempting to coerce plaintiff to alter grades. If that were so, plaintiff at most would state a contract claim, not a constitutional one. *Id.* at 426, fn. 2.

Similarly, in *Brown v. Armenti*, 247 F.3d 69 (3d Cir. 2001), a tenured professor alleged that he was suspended after refusing the university president's instruction to change a student's grade. In ruling that the defendant university president was entitled to summary judgment, the Third Circuit stated

> Because grading is pedagogic, the assignment of the grade is subsumed under the university's freedom to determine how a course is to be

> taught. We therefore conclude that a public university professor does not have a First Amendment right to expression via the school's grade assignment procedures. *Id.* at 75.

While the *professor* relied on *Parate* in asserting his claim, the Third Circuit rejected the rule of that case, stating that a "more realistic" view of the university-professor relationship requires that "[w]hether the school registrar is told that a student's performance rates an 'F' or an 'Incomplete' is not a matter that warrants the 'intrusive oversight by the judiciary in the name of the First Amendment.'" *Brown v. Armenti*, at 75, *citing*, *Connick v. Myers*, 461 U.S. 138, 146 (1983).

Petitioner next cites *Hillis v. Stephen F. Austin State University*, 665 F.2d 547 (5th Cir. 1982), *cert. denied*, 457 U.S. 1106 (1982) for a generalized statement regarding the concept of academic freedom. However, Petitioner fails to note the holding of *Hillis*, where the Fifth Circuit concluded that the professor's refusal to assign a grade to a student as instructed by his department chair did not constitute a "teaching method" for which the professor enjoyed some measure of First Amendment academic freedom. *Id.* at 552-553.

In *Keen v. Penson*, 970 F.2d 252 (7th Cir. 1992), a student criticized the course requirements of a professor, both to him in class and to her classmates outside of the classroom. The professor sent the student various demeaning and insulting letters in an attempt to extract an apology from her. When she refused to apologize, he gave her an "F" grade. The university demoted the professor for this and other behavior. In discussing the relative academic freedom of a professor and a university, the Seventh Circuit noted "[t]his Court has recognized the supremacy

of the academic institution in matters of curriculum content." *Id.* at 257. The court also noted with approval the lower court ruling that the giving of a grade is not protected by the principle of academic freedom. *Id.*

Finally, in *Berg v. Bruce*, 112 F.3d 322 (8th Cir. 1997), a principal issued notices to one of his teachers regarding various complaints about her teaching methods and grades issued. The teacher refused to cooperate in addressing any of the principal's concerns or his efforts to remediate her practices and was thereafter terminated. In dismissing the teacher's allegations of a First Amendment right to assign grades as she saw fit, the Eighth Circuit considered *Parate*, but concluded consistent with that case that "[s]ince there is no evidence that [the principal] ordered or attempted to get [the teacher] to change any particular grade, . . . we need not consider whether the First Amendment gave [the teacher] the right to assign grades as she saw fit." *Id.* at 329.

Although there may be some difference across the circuits as to whether a professor's First Amendment rights are violated where he is forced to change a grade, this survey of the circuit courts initiated by Petitioner indicates there is absolute agreement that a professor has no constitutional interest in the grade a student ultimately receives. Thus, an administrative change of a grade, without the element of coercion, does not impact the professor's constitutional interest in any manner. Ironically, *Parate* – the very case Petitioner seeks to distinguish – is the only case that clearly recognizes a constitutional interest for a professor compelled to make a grade change and, as such, potentially affords a professor the greatest protection.

It remains, however, that there is no allegation of coercion in this case; in fact, Petitioner has specifically denied that he was ever asked to change the grade he submitted. He has, therefore, failed to articulate a constitutionally protected interest and failed to state a claim of violation of any cognizable constitutional right.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court deny the petition for writ of certiorari in this matter.

Respectfully submitted,

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